Supreme Court, U.S.
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No. 10-

IN THE

Supreme Court of the United States

ALFRED JANIGA,

Petitioner,

v.

QUESTAR CAPITAL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Seventh Circuit erred in ruling that Petitioner's act of signing one page of a five page new client account application objectively demonstrated his assent to an arbitration provision contained on another page regardless of whether he was ever provided a copy of the other pages of the application, including the entire arbitration agreement, thus resulting in Petitioner's unknowing waiver of his Seventh Amendment right to a trial by jury?

PARTIES

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Seventh Circuit:

The Petitioner here and Appellee below is Alfred Janiga.

The Respondent here and appellant below is Questar Capital Corporation.

Hessek Financial Services, LLC and Wieslaw Hessek were additional appellants below but are not parties to this Petition.

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The opinion of the Court of Appeals for the Seventh Circuit is reported at 615 F.3d 735 (7th Cir. 2010) and available at 2010 WL 3023945 and is reprinted in the Appendix to the Petition ("Pet. App."). The District Court's oral opinion is not reported but the relevant portions are reprinted at Pet. App. B – 18a-20a.

JURISDICTION

The Court of Appeals entered its judgment on August 2, 2010. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment to the United States Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right to a trial by jury shall be preserved and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

This case also involves provisions of the Federal Arbitration Act, 9 U.S.C. §1, *et seq.* The pertinent provisions are reproduced at Pet. App. C – 21a-24a.

STATEMENT OF THE CASE

Petitioner Alfred Janiga ("Janiga") is a Polish immigrant whose natural and primary language is Polish. Janiga has no securities experience and limited knowledge of securities and investing.

Over the course of two years, Wieslaw Hessek ("Hessek"), a licensed securities broker, repeatedly solicited Janiga to allow Hessek to invest Janiga's money. Hessek and Janiga are brothers. All conversations between Janiga and Hessek were in the Polish language. Hessek, being Janiga's brother, knows Janiga cannot read English fluently without assistance or a translator and knows Janiga can speak and understand limited English.

In March, 2008, Janiga agreed to invest his money with Hessek, Respondent Hessek Financial Services, LLC ("Hessek Financial") and Respondent Questar Capital Corporation ("Questar"). Hessek is a securities broker and does business through his company, Hessek Financial. Hessek's client brokerage accounts are set up and maintained by Questar. All securities trades initiated by Hessek are processed and executed by Questar as the broker-dealer.

Hessek told Janiga, in Polish, he would take care of everything with regards to setting up an investment account for Janiga's money. Hessek told Janiga all he needed was for Janiga to sign "a piece of paper." The signature page Janiga signed was on the third page of a five page document. Contrary to Hessek's representations, the document is composed of three

parts: a "New Account Form" requiring personal information, a "Client Agreement" and a "Questar Sponsorship Program Disclosure." (The New Account Form, Client Agreement and Sponsorship Program Disclosure are referred to collectively herein as the "Application.") A signature line is only provided at the conclusion of the New Account Form and not in the Client Agreement nor in the Sponsorship Program Disclosure. Hessek then took the single piece of paper without giving a copy of it or anything else to Janiga. At no time up to the filing of the Complaint in the District Court had Hessek, or anyone at Hessek Financial or Questar, ever given Janiga a copy of the Application containing the arbitration clause or allowed him to view the Application containing the arbitration clause. Janiga asked Hessek numerous times for a copy of the documents he signed. Hessek promised each time to send copies but never followed through on such promises.

Further, at no time did Hessek ever inform Janiga, orally or in writing, of any terms of the Application including the existence or meaning of an arbitration agreement. To date, no evidence has been proffered by Questar, Hessek or Hessek Financial that any of them or their employees tendered a copy of any part of the Application to Janiga (or otherwise revealed to Janiga any terms of the Application), especially any arbitration agreement, prior to the filing of the Complaint in the District Court.

When Questar filed its Memorandum of Law in Support of its Motion to Stay Proceedings and Compel Arbitration with the District Court, it contained a full

copy of the alleged agreement between the parties, Janiga and his counsel learned for the first time what document Janiga had in fact signed and the purported terms therein.

On April 23, 2009, Janiga filed a six count Complaint against Hessek, Hessek Financial and Questar claiming (i) violations of the Securities Exchange Act of 1934, (ii) negligence, (iii) breach of fiduciary duty, (iv) common law fraud, (v) excessive trading and churning of investment account and (vi) violations of the Illinois Fraud and Deceptive Business Practices Act. Instead of filing an Answer in the case, on May 20, 2009, Questar filed a Motion to Dismiss or, in the Alternative, Motion to Stay Proceedings and Compel Arbitration claiming that Janiga's claims are subject to mandatory arbitration through the Financial Industry Regulatory Authority ("FINRA") by virtue of his signing page three of the Application and thus binding Janiga to the arbitration agreement clause in the Client Agreement portion of the Application. Hessek and Hessek Financial made the same argument through their Motion to Compel Arbitration filed on June 10, 2009. On July 10, 2009, the District Court denied Questar's, Hessek's and Hessek Financial's Motions to Stay Proceedings and Compel Arbitration on the grounds that since no consent existed between the parties as to the terms of the document., Janiga was not bound to the arbitration agreement contained in the document.

Questar appealed such ruling by filing a Notice of Appeal on August 7, 2009. Hessek and Hessek Financial also appealed the ruling of the District Court by filing a Notice of Appeal on August 20, 2009. The appeals of

Questar and Hessek were consolidated on August 25, 2009. The Seventh Circuit's decision was entered on August 2, 2010. The Court reasoned that Janiga's act of signing one page of the Application objectively demonstrated his assent to the arbitration agreement contained on another page regardless of whether he was provided a copy of the actual arbitration agreement.

REASONS FOR GRANTING THE PETITION

This case presents an important question of federal law that has not been, but should be, settled by this Court (*see* S. Ct. R. 10(c)): whether an arbitration agreement clause in a written document is enforceable against a person when the written document itself was never given to him and the terms therein, including the agreement to arbitrate, were never communicated to him? It is far too common in today's day and age for representatives of corporate giants to force-feed a single signature page from a multipage and multi-part document to individuals for signature without allowing the individual to see the full document at signing, yet alone receiving a full copy of the document for review thereafter.

The Seventh Circuit came to the conclusion that the sole act of Janiga putting his signature on page three of the New Account Form, bound him to the terms of the boilerplate Client Agreement, which includes a mandatory arbitration agreement on another page even though Janiga never saw a copy of the Application, was never given a copy of any part of the Application and could not read the terms of the Application because the terms were written in English, a written language Janiga needs a translator or assistance to understand.

The Seventh Amendment provides that "(i)n suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved . . . " *U.S. Const. Amend. VII.* While the constitutionality of mandatory arbitration clauses in agreements is not in question in this matter, the unknowing and involuntary waiver of a person's Seventh Amendment rights is in question in this case.

The Federal Arbitration Act ("FAA"), 9 U.S.C. §1 *et seq.*, provides that when a written contract contains an arbitration clause and disputes arise out of such contract, the arbitration provision shall be enforceable "save for grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. §2. The FAA thereby places arbitration agreements on an equal footing with other contracts. *Rent-A-Center, West, Inc. v. Jackson*, 130 S.Ct. 2772, 2776 (2010) citing *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443, 126 S.Ct. 1204 (2006).

The parties are in agreement that since there was an issue as to the making and existence of the alleged contract which contains an arbitration clause, it was proper for the District Court and not an arbitrator to hear and rule on Hessek, Hessek Financial's and Questar's motions to compel arbitration. The Seventh Circuit agreed as well ruling that the District Court was correct – the court must decide whether a contract exists before it decides whether to stay an action and order arbitration. Pet. App. at 13a.

Janiga does not dispute this Court's longstanding rulings that federal policy favors arbitration. However,

the FAA is not an iron fist that demands arbitration in any case where a document contains an arbitration agreement[1]. Sections 2, 3 and 4 of the FAA provide exceptions to the mandatory enforcement of arbitration agreements that apply in this matter, one of which is agreements that are defective in creation. 9 U.S.C. §2, 3 and 4.

When considering Questar's Motion to Compel, the District Court, pursuant to Section 3 of the FAA, considered those issues regarding the making and performance of the Application. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 (1967). When a court must decide whether the parties agreed to arbitrate a certain matter, such court is to apply ordinary state-law principals that govern the formation of contracts. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

Under Illinois law, it is the objective manifestation of intent which controls whether the parties to this case agreed to arbitrate. *Caporale v. Mar Les, Inc.*, 656 F.2d 242, 244 (7th Cir. 1981). Illinois law should apply in this

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1. In fact, Justice Black in his dissent in *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967) went to great lengths in discussing the legislative history of the United States Arbitration Act of 1925 (now the FAA). He stated that Senator Walsh of Montana, during hearings on the bill, said "the court has got to hear and determine whether there is an agreement of arbitration, undoubtedly, and it is open to all defenses, equitable and legal, that would have existed at law." *Id.* at 413. Justice Black further noted that a representative of one of the chambers of commerce in favor of the bill "assured the Senate subcommittee that the constitutional right to jury trial is adequately safeguarded by the Act." *Id.*

case as it is the law of the State where Janiga objected to arbitrability. Even if New York law applies (as New York law is the choice of law in the Client Agreement) or if Minnesota law applies (as Minnesota law is the choice of law in the arbitration clause in the Client Agreement), New York state law and Minnesota state law mirror Illinois state law in its requirement that Courts look to the objective manifest intention of the parties whether the parties agreed to arbitration as demonstrated through objective conduct. *Janiga v. Questar*, Pet. App. 14a-15a., citing *Carey v. Richards Bldg. Supply Co.*, 856 N.E.2d 24, 27 (Ill. 2006); *Flores v. Lower E. Side Serv. Ctr.*, 828 N.E.2d 593, 597 (N.Y. 2005); *Hickman v. SAFECO Ins. Co. of Am.*, 695 N.W.2d 365, 370 n.7 (Minn. 2005).

The District Court, after considering the briefs of the parties and the aforementioned facts, properly concluded that there was no consent among the parties as to an agreement to arbitrate any disputes among them. The Seventh Circuit circumvented the District Court and summarily concluded:

"The problem for Janiga is that he signed a contract, and that the paper he signed refers to arbitration. Janiga's signature – which he admits was given voluntarily – objectively demonstrated his assent to the contract." Pet. App. 15a. Even though Janiga signed one page of the Application and even though his signature is just below a statement saying the undersigned has read and understood the arbitration agreement contained on another page, this does not mean he agreed to arbitrate any claims. It is undisputed that Janiga never received a copy of the arbitration

agreement and even if he had received a copy of the Application or a portion thereof, he could not have understood any portion, including the arbitration disclaimer language just above his signature because such documents were written in English, a language Janiga cannot read fluently. The Illinois Consumer Fraud and Deceptive Practices Act required Hessek, Hesseck Financial and/or Questar to interpret the Application, if it or any part thereof had been given to Janiga, in Polish and certify the same in order for the arbitration agreement to be binding on Janiga. 815 ILCS 505/2N.

The totality of the facts does not show that the parties had an arbitration agreement or any other agreement for that matter other than an oral agreement for Hessek to open an account to invest Janiga's money. Neither Hessek nor Questar reviewed any terms of the Application with Janiga nor did Hessek or Questar ever give Janiga a copy of the Application. Hessek knew his brother could not read English and yet did nothing to explain what he was asking Janiga to sign. Hessek repeatedly told Janiga that Hessek would take care of everything. These facts are not disputed. Hessek's actions fail to establish that any contract was created, especially a contract containing an arbitration agreement. As the District Court properly pointed out, "Janiga acknowledges that he entered into an Agreement to open a brokerage account, but he doesn't acknowledge that he entered into an Agreement that contained an arbitration provision." The District Court also observed that given Janiga's lack of English skills, Hessek and Questar had a fiduciary obligation to Janiga to ensure Janiga understood what he was signing, presumably either by translation or through giving Janiga a copy.

Illinois law clearly states that since Hessek and Janiga conducted business in Polish, especially discussions relating to Janiga investing money with Hessek and Quester, Hessek and Questar were required to interpret into Polish any agreement Janiga was asked to sign. 815 ILCS 505/2N.

This Court has repeatedly concluded that parties cannot be compelled to arbitrate claims if the parties have not agreed or made a bargain to arbitrate. *Green Tree Financial Corp. – Alabama v. Randolph*, 531 U.S. 79, 90, 121 S.Ct. 513, 521 (2000); *Gilmer v. Interstate/ Johnson Lane Corp.*, 500 U.S. 20, 26, 111 S.Ct. 1647, 1652 (1991). The Seventh Circuit has thrown out the basic requirement of consent of the parties in contract formation and condoning the financial industry's tactics of forcing customers to "sign here" to open accounts without giving a customer a chance to review any paperwork, yet alone give the customer a copy of any paperwork after execution. This is not a case whereby a customer was given paperwork, the customer objects to signing the paperwork due to the inclusion of an arbitration clause and is told to take it or leave it, as is sadly customary in the industry. This is a case whereby the customer did not even have an opportunity to understand what he allegedly bargained. The Seventh Circuit's ruling tells all of corporate America that it does not need to produce a copy of any agreement to a customer because as long as a company obtains a customer's signature anywhere on a document, even if only on a signature page, the customer is bound to any and all terms therein, including the unknowing waiver of a Constitutional right to a trial by jury. This Court must correct the error of the Seventh Circuit and hold

the financial industry to the simple yet long settled premise that its customers cannot be not bound to the terms of a contract, including an arbitration agreement clause, unless such terms are communicated to the customer. Janiga does not ask this Court to create new precedent, he simply asks this Court to ensure current law is enforced.

CONCLUSION

For all the foregoing reasons, Petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully Submitted,

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APPENDIX A — DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT ARGUED JANUARY 15, 2010 DECIDED AUGUST 2, 2010

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 09-2982 & 09-3087

ALFRED JANIGA,

Plaintiff-Appellee,

v.

QUESTAR CAPITAL CORPORATION, et al.,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 09 C 2464—**Milton I. Shadur**, *Judge*.

Argued January 15, 2010 -- Decided August 2, 2010

Before WOOD, EVANS, and SYKES, *Circuit Judges*.

WOOD, *Circuit Judge*. This case poses the question whether the court or an arbitrator is responsible for deciding whether a particular document that the parties signed qualifies as a contract, and if so, whether that contract includes an arbitration clause. Alfred Janiga is

a Polish immigrant who has lived and worked in Illinois for more than 20 years; nevertheless, to this day (by his account) he understands only limited English. Janiga's brother, Weislaw Hessek, runs Hessek Financial Services, LLC ("Hessek Financial") and is a registered representative of Questar Capital Corporation ("Questar"), a securities broker-dealer. Problems erupted after Hessek arranged for his brother to invest with Questar. Janiga signed one page of Questar's New Account Form and began depositing money into his new account. The Form included an arbitration clause. One year after opening the account, and unhappy with the returns on his investment, Janiga sued Hessek, Hessek Financial, and Questar.

Defendants (to whom we refer collectively as "Questar" unless the context requires otherwise) asked the district court to stay proceedings and order arbitration under the Federal Arbitration Act ("FAA"), *9 U.S.C. §§ 3, 4*. The district court decided that it could not order arbitration immediately because it was not clear whether a contract between Questar and Janiga even existed. It therefore denied the motions without prejudice and told Questar that it could renew its motion if and when the court concluded that there was a contract. Construing this as an order denying a motion to refer the case to arbitration, all three defendants filed this immediate appeal. *Id. § 16*.

The Supreme Court has said that the responsibility to determine the validity of the contract as a whole is assigned to the arbitrator, while specific challenges to

an arbitration clause normally remain with the court. See *Rent-A-Center, West, Inc. v. Jackson, 130 S. Ct. 2772, 2778, 177 L. Ed. 2d 403 (2010)* (agreements to arbitrate are on an equal footing with other contracts and are subject to generally applicable contract defenses). But who decides whether a contract exists at all? Janiga believes that this is an issue for the district court. Questar takes the opposite position and urges that the arbitrators have this responsibility. The district court decided that it should address the contract-formation question, but it refrained from doing so on the ground that it lacked sufficient evidence to reach a conclusion. We agree with the district court that the existence of a contract is an issue that the courts must decide prior to staying an action and ordering arbitration, unless the parties have committed even that gateway issue to the arbitrators. Id. at 2779-81. Unlike the district court, however, we are satisfied that the record contains enough evidence to resolve the question. That evidence shows that the parties formed a contract and that their agreement included an arbitration clause. We therefore reverse the district court's order and remand with instructions to grant Questar's motion to stay and to order arbitration.

I

Janiga is the President and Secretary of Polkraft Builders Corporation, an Illinois company that specializes in residential and commercial remodeling. According to Janiga, Hessek lobbied him for two years to invest with Questar. After Janiga finally agreed to

open an account in March 2008, Hessek brought Janiga a "piece of paper" and told him to sign it. The paper Hessek proffered was page three of Questar's New Account Form. Janiga represents that Hessek never discussed "any terms of any agreement . . . including the meaning and existence of arbitration as a dispute resolution" and, despite Janiga's explicit request, Hessek never provided copies of any documents related to the account. Janiga speaks and understands only limited English. According to Janiga, all of his communications with Hessek were in Polish.

The New Account Form is actually just one in a series of three connected documents; the other two forms are the Client Agreement and the Sponsorship Program Disclosure. All contract documents are written in English. Janiga admits that he saw and signed page three of the New Account Form when Hessek gave it to him, but he says that this is all that he saw. Page three, however, made no secret of the fact that there was an arbitration clause in the picture. Directly above Janiga's signature, it proclaims: "I/WE HAVE READ AND UNDERSTOOD THE PRE-DISPUTE ARBITRATION AGREEMENT CONTAINED ON PAGE 4, PARAGRAPH 9 OF THE CLIENT AGREEMENT AND HAVE RECEIVED A COPY THEREOF."

As that language indicates, the arbitration clause appears in the separate Client Agreement, which follows the page that Janiga signed. The clause states in part:

Appendix A

I (we) understand that my (our) account is subject to the arbitration rules of the Financial Industry Regulatory Authority. Arbitration is used to resolve a dispute between two parties. . . .

THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT, THE PARTIES AGREE AS FOLLOWS:

> (A) All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed.
>
> (B) Arbitration awards are final and binding; a party's ability to have a court reverse or modify an arbitration award is very limited.
>
> . . . .

I (we) agree that all controversies that may arise between us concerning any order or transaction, or the continuation, performance or breach of this or any other agreement between us, where entered into before, on, or after the date this account is

> opened, shall be determined by arbitration before a panel of independent arbitrators set up pursuant to the rules of the Financial Industry Regulatory Authority, or, where applicable, a court of competent jurisdiction.

The Client Agreement specifies that New York law governs the agreement and its enforcement, but the arbitration clause found within the Client Agreement provides that the FAA and Minnesota law govern the arbitration agreement.

Once Janiga opened his account, Questar started to send monthly statements. For a time, Janiga did not register any complaints. Three months after signing the agreement, Janiga invested an additional $180,000 in his account. A year into the relationship, however, Janiga filed a complaint against Hessek, Hessek Financial, and Questar in the United States District Court for the Northern District of Illinois. Janiga's complaint asserted six theories of recovery against the defendants: (1) violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5; (2) negligence; (3) breach of fiduciary duty; (4) fraud; (5) excessive trading and churning of an investment account; and (6) violation of the Illinois Fraud and Deceptive Business Practices Act.

On May 20, 2009, Questar filed a motion to dismiss, or in the alternative, to stay proceedings and order arbitration. On June 10, 2009, Hessek and Hessek Financial filed a separate motion asking the court to order arbitration. Janiga conceded that he "agreed to

invest" with the defendants, but he offered a number of reasons why the district court should deny those motions and disregard the arbitration clause. To resolve these issues, the district court held three status conferences over two months. The first two of these addressed various issues related to contract enforcement, such as Illinois consumer protection law and Hessek's purported fiduciary duty. At the third and final status conference, on July 10, 2009, the district court focused on the "meeting of the minds," in light of Janiga's limited understanding of English and his assertion that he had never seen more than one page of the contract. The district court concluded that it would not stay proceedings and order arbitration unless and until the defendants established that a contract was formed. The district court judge orally explained his decision as follows:

> [T]he step that has to come first is to determine whether there was an Agreement. And accordingly I am at this point denying the motion to stay and to compel arbitration . . . without prejudice for the possible renewal if it's determined on an appropriate record that there is indeed an Agreement to arbitrate at all. . . . It seems to me that what [] you ought to be thinking about is how to pose the issue in a way that the Court can address it, whether through hearing, I would expect, or some appropriate way.

The district court entered an order denying the motions without prejudice on July 10, 2009.

Questar filed a timely notice of appeal on August 7, 2009, *FED. R. APP. P. 4(a)(1)(A)*, and Hessek filed a separate notice of appeal on August 20, 2009, *FED. R. APP. P. 4(a)(3)*. Questar's notice of appeal was docketed as No. 09-2982; Hessek's appeal was docketed as No. 09-3087. We consolidated the appeals for our review.

II

Before turning to those questions, however, we must explain why our appellate jurisdiction is secure. While ordinarily the courts of appeals have jurisdiction only over final decisions, *28 U.S.C. § 1291*, the FAA establishes appellate jurisdiction over certain interlocutory appeals. See *Arthur Andersen LLP v. Carlisle, 129 S. Ct. 1896, 1900, 173 L. Ed. 2d 832 (2009)*. It provides that an interlocutory appeal may be taken from a district court order "refusing a stay of any action . . . under this title" or "denying a petition . . . to order arbitration to proceed." *9 U.S.C. § 16(a)(1)(A), (B)*. We have held that this rule applies even if the district court expressly intended to revisit the issue after additional fact-finding. See, *e.g., Boomer v. AT&T Corp., 309 F.3d 404, 412-13 (7th Cir. 2002)*; *Koveleskie v. SBC Capital Mkts., Inc., 167 F.3d 361, 363 (7th Cir. 1999)*.

That said, we have also recognized that some housekeeping orders that give rise to a "delay incident to an orderly process" are not immediately appealable. *Cont'l Cas. Co. v. Staffing Concepts, Inc., 538 F.3d 577 (7th Cir. 2008)* (quoting *Middleby Corp. v. Hussman Corp., 962 F.2d 614, 616 (7th Cir. 1992)*). In *Continental*

Casualty, the district court struck without prejudice the defendants' motion to dismiss or stay the action pending arbitration, in order to give the court an opportunity to address pending motions related to personal jurisdiction and venue. *538 F.3d* at 579-80. This rule recognizes that district courts must be given the discretion to manage their cases; routine orders that incidentally delay a decision on a motion to order arbitration fall outside the scope of *§ 16*.

This case involves more than an action designed to permit an orderly process. The district court denied defendants' motions to stay because it believed that the defendants had not established that a contract existed. This is the type of decision that we may review immediately. We do so now, and decide that the district court erred in denying Questar's motion, and that it should take another look at Hessek and Hessek Financial's motion.

III

We begin our analysis with the FAA. *9 U.S.C. §§ 1-16*. The FAA provides that a written arbitration agreement in certain contracts "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." *Id. § 2*. Although it is often said that there is a federal policy in favor of arbitration, federal law places arbitration clauses on equal footing with other contracts, not above them. See *Rent-A-Center, supra*, at 2776; *Gotham Holdings, LP v. Health Grades, Inc., 580 F.3d*

664, 666 (7th Cir. 2009) (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Stanford University, 489 U.S. 468, 476, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)).* Any "preference" for arbitration is reserved for the interpretation of the scope of a valid arbitration clause, see, *e.g., AT&T Techs., Inc. v. Communications Workers of Am., 475 U.S. 643, 649-50, 106 S. Ct. 1415, 89 L. Ed. 2d 648 (1986),* which is not at issue here. The parties do not dispute that the scope of the arbitration clause is broad enough to encompass the issues raised in the complaint.

As we have already noted, all three defendants filed motions under sections 3 and 4 of the FAA. Section 3 allows a party to an action in federal court to request a stay of that action pending arbitration if a valid arbitration clause exists, and section 4 allows a party to file a motion to order that arbitration. *9 U.S.C. §§ 3, 4.* The district court denied these motions without prejudice pending a determination that a contract existed.

The first aspect of the district court's ruling that Questar challenges is the conclusion that it was the court's job to decide whether a contract exists. The division of labor between courts and arbitrators is a perennial question in cases involving arbitration clauses. In *Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S. Ct. 1801, 18 L. Ed. 2d 1270 (1967),* the Supreme Court announced that, when faced with motions to stay suits or order arbitration, courts should evaluate only the validity of

the arbitration agreement; challenges to the validity of the entire contract—*e.g.*, fraud in the inducement—should be left to the arbitrator. See *James v. McDonald's Corp., 417 F.3d 672, 680 (7th Cir. 2005)* (describing the *Prima Paint* rule). In *Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006)*, the Court reviewed a decision of the Supreme Court of Florida that refused to enforce an arbitration clause in a contract that was challenged as unlawful under state law. Applying *Prima Paint* and *Southland Corp. v. Keating, 465 U.S. 1, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984)*, the Court "conclude[d] that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court." *546 U.S.* at 446. In short, "a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

Buckeye thus reaffirmed the validity of *Prima Paint* in allocating the responsibility for two types of challenges: challenges to the validity of the arbitration agreement and challenges to the contract as a whole. In a footnote, however, the Court in *Buckeye* acknowledged the possibility of a third type of challenge, which is exactly the issue that is before us now:

> The issue of the contract's validity is different from the issue whether any agreement between the alleged obligor and obligee was

> ever concluded. Our opinion today addresses only the former, and does not speak to the issue decided in the cases cited by respondents (and by the Florida Supreme Court), which hold that it is for courts to decide whether the alleged obligor ever signed the contract, whether the signor lacked authority to commit the alleged principal, and whether the signor lacked the mental capacity to assent.

Id. at 444 n.1 (internal citations omitted). See *Rent-A-Center, supra,* at 2778, n.2 ("The issue of the agreement's 'validity' is different from the issue whether any agreement between the parties 'was ever concluded,' and, as in [*Buckeye*], we address only the former."). As we understand these footnotes, the Court was reserving for another day the question who is responsible for deciding whether the parties formed a contract at all.

In *Granite Rock Co. v. International Brotherhood of Teamsters, 130 S. Ct. 2847, 177 L. Ed. 2d 567 (2010),* the Court eliminated all doubt about the answer to that question, when it said "[i]t is similarly well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide." *Id.* at 2855-56. In so doing, it endorsed the position that this court had taken before *Buckeye.* See, *e.g., Deputy v. Lehman Bros., Inc., 345 F.3d 494 (7th Cir. 2003)* (remanding a case to the district court to assess whether there was a meeting of the minds in light of a motion to compel

arbitration); *Sphere Drake Ins. Ltd. v. All Am. Ins. Co., 256 F.3d 587, 591 (7th Cir. 2001)* (holding that "as arbitration depends on a valid contract an argument that the contract does not exist can't logically be resolved by the arbitrators"); *Gibson v. Neighborhood Health Clinics, 121 F.3d 1126 (7th Cir. 1997)* (addressing the argument that a promise lacked consideration as a judicially-determined issue). This rule follows logically from the Court's consistent emphasis on the fact that arbitration is a matter of contract. See, *e.g., Rent-A-Center, supra,* at 2776.

On this point, therefore, the district court was correct—the court must decide whether a contract exists before it decides whether to stay an action and order arbitration. The only place where we part company with its conclusion is its belief that it was not able to resolve this threshold question. Since Janiga does not challenge the validity of the arbitration clause itself, the district court should have constrained its review to the narrow question whether a contract existed between the parties. In our view, the record contains enough information to permit a decision on the existence of a contract. As our review is *de novo,* we can resolve that issue ourselves. See *Newkirk v. Vill. of Steger, 536 F.3d 771, 774 (7th Cir. 2008)* (reviewing the formation of a contract *de novo*).

What concerned the district court was whether Janiga appreciated the nature of the agreement that he had signed, or, as the court put it, whether there was a meeting of the minds. Janiga follows the same path in

the arguments he made both in the district court and now on appeal. These arguments, if accepted, might lead to the conclusion that the contract is not enforceable. For example, Janiga argues that he did not get a copy of the contract, he never read it, he could not read it if he tried, and he did not know what he agreed to do. He also argues that Hessek's fiduciary duty, Illinois consumer protection law, and procedural unconscionability invalidate the contract. But none of these arguments refutes the basic point that Janiga signed an agreement with Questar (using the services of Hessek) and that the parties performed under that agreement for a year or so. We are left only with the question whether that contract is enforceable, and that is the kind of issue that *Prima Paint*, *Buckeye*, and *Rent-A-Center* put squarely in the arbitrator's box.

Looking more formally at the question whether a contract exists between Janiga and Questar, we recognize first that contract formation is governed by state law. See *First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944, 115 S. Ct. 1920, 131 L. Ed. 2d 985 (1995)*. There is some question here about which state's law applies: the contract was signed in Illinois; it provides that its enforcement shall be governed by the laws of New York; and it separately provides that the arbitration agreement is subject to Minnesota law. We need not dwell on that problem, however, because we see no difference among the laws of those three states that would be dispositive. The goal in all three states is to give effect to the intent of the parties as demonstrated through objective conduct. *Carey v.*

Richards Bldg. Supply Co., 367 Ill. App. 3d 724, 856 N.E.2d 24, 27, 305 Ill. Dec. 492 (Ill. 2006); *Flores v. Lower E. Side Serv. Ctr., 4 N.Y.3d 363, 828 N.E.2d 593, 597, 795 N.Y.S.2d 491 (N.Y. 2005)*; *Hickman v. SAFECO Ins. Co. of Am., 695 N.W.2d 365, 370 n.7 (Minn. 2005)*. If the terms of the contract are unambiguous, the court must enforce the contract as written. *Lewitton v. ITA Software, Inc., 585 F.3d 377, 380 (7th Cir. 2009)* (applying Illinois law); *Graev v. Graev, 11 N.Y.3d 262, 898 N.E.2d 909, 918, 869 N.Y.S.2d 866 (N.Y. 2008)*; *Metro. Airports Comm'n v. Noble, 763 N.W.2d 639, 645 (Minn. 2009)*.

The problem for Janiga is that he signed a contract, and that the paper he signed refers to arbitration. Janiga's signature—which he admits was given voluntarily—objectively demonstrated his assent to the contract. Indeed, Janiga admits that he agreed to open a brokerage account. All that is left for us is to determine whether the contract he signed included an arbitration clause. It does. Even if we limit our review to the one page that Janiga signed, it is impossible to avoid the conclusion that he agreed to arbitration. As we noted at the outset of this opinion, directly above his signature is the following statement, in all capital letters: "I/WE HAVE READ AND UNDERSTOOD THE PRE-DISPUTE ARBITRATION AGREEMENT CONTAINED ON PAGE 4, PARAGRAPH 9 OF THE CLIENT AGREEMENT AND HAVE RECEIVED A COPY THEREOF." This clause is unambiguous; Janiga acknowledged by his signature that he read, understood, and received a copy of the arbitration agreement, and this clause (distinct from the arbitration

clause itself) says that disputes would be subject to arbitration. Questar also offers various pieces of objective evidence that support its claim that a contract exists, including Janiga's two deposits and his admission that he agreed to invest. Again, Janiga's various complaints about enforceability are not at issue here; the only issue for the court is whether a contract was formed. It was.

Janiga finally argues that the Seventh Amendment bars arbitration. But that argument proves much too much; parties are entitled to opt in a contract for an alternative method of dispute resolution that involves neither courts nor juries. That is implicit in any arbitration agreement. Here there is more: the plain language of the contract includes an express waiver of the right to a jury trial, and we uphold such waivers even in form contracts. See, *e.g.*, *Sherwood v. Marquette Transp. Co.*, *587 F.3d 841, 842 (7th Cir. 2009)*. The district court therefore should order arbitration between Janiga and Questar.

We cannot be as confident at this point that the arbitration agreement between Janiga and Questar also sweeps in Hessek and Hessek Financial. The latter two defendants have asked us to hold that the arbitration clause benefits and binds them to the same extent as Questar. Hessek's primary argument is that he and his company are agents of Questar. Certainly an agent may bind a principal to an arbitration agreement, see *Zurich Am. Ins. Co. v. Watts Indus.*, *417 F.3d 682, 687 (7th Cir. 2005)*, so there is no dispute that Questar is a party to

the contract even though it was acting through Hessek. Hessek's appeal asks whether agents can receive the benefit of an arbitration agreement between their principal and a third party. We have answered that question in the affirmative for employees acting within the scope of their agency, *Dunmire v. Schneider, 481 F.3d 465, 467 (7th Cir. 2007)*, and there does not seem to be any reason to change the rule for non-employee agents. The remaining questions, therefore, are whether Hessek and Hessek Financial were agents of Questar, and whether the claims asserted here are within the scope of their agency. This is an issue about the arbitrability of certain claims, and so it should be decided by the court. But since the district court has not had the opportunity to pass on these issues in the first instance, we remand this much of the case to the district court so that it can make the findings necessary to decide whether these contract terms apply to Hessek and Hessek Financial based on agency principles or otherwise.

Our decision in this appeal should not be read to pass any judgment on Janiga's arguments regarding the enforceability of the contract. *Prima Paint* and *Buckeye* do not banish these arguments; they simply assign the responsibility for evaluating them to an arbitrator.

For these reasons, we REVERSE the decision of the district court to deny Questar's motion and REMAND for further proceedings consistent with this opinion.

APPENDIX B — EXCERPTS OF ORAL DECISION OF THE DISTRICT COURT DATED JULY 10, 2009

* * *

THE COURT: Good morning.

Well, this strikes me as pretty much a unique situation and let me tell you why I think that. As you know, Questar, not surprisingly, invokes the Prima Paint case seeking to compel arbitration, because it's true that the plaintiff is not challenging the arbitration clause as having been fraudulently induced as contrasted with making, for example, like attack on the entire Agreement that designated Questar as the broker. But the situation that's advanced here by the plaintiff is really, as I see it, a unique variant on that, and let me tell you why.

Although it's admittedly a figure of speech to talk about "meeting of the minds," you know, which we get inculpated with in law school, it reflects a truism — that is enforcing an Agreement to arbitrate necessarily requires the existence of an Agreement to arbitrate. Now for that purpose, you see, it doesn't matter whether the claimed absence of Agreement is a product of fraud or the product of something else, for example, a nondisclosure that might not amount to fraud.

In that respect, you see, I find that Questar engages in considerable oversimplification when I read this introduction to the memo says:

Appendix B

> "Plaintiff doesn't dispute that we knowingly entered into a contract, a brokerage contract with Questar. In fact plaintiff has repeatedly conceded that we 'agreed to invest with the defendants.' That express admission requires him to arbitrate any and all disputes with Questar."

That's just not so. What the contrary thing is that Janiga — is that how he pronounces his name?

MR. CLOH: Correct.

THE COURT: Plaintiff Janiga acknowledges that he entered into an Agreement to open a brokerage account, but he doesn't acknowledge that he entered into an Agreement that contained an arbitration provision. And you see before you can compel the plaintiff to arbitrate the dispute, it has to be determined that he agreed to do that.

All of the notions of arbitration that are embodied in the Federal Arbitration Act clearly indicate that when people agree to arbitration they arbitrate, but it requires an Agreement to do that. You don't enforce it against somebody who hasn't agreed. And to submit that to an arbitrator really would be total bootstrapping. Because if the arbitrator doesn't belong, then the arbitrator really has no posture to decide the issue.

So this isn't a question, as I said at the beginning of a reason for the asserted lack of consent, whether it

would be characterized as fraud in the inducement or in any other way. It's rather the question of the existence or nonexistence of consent. So by definition, that has to be for the Court to decide, not and arbitrator whose status and authorization is the very thing that's in question.

Now what that of course means that if I decide that, then we may well find ourselves with a motion to arbitrate and for a stay to be operative. But the step that has to come first is to determine whether there was an Agreement.

And accordingly I am at this point denying the motion to stay and to compel arbitration. But by definition that's without prejudice for the possible renewal if it's determined on an appropriate record that there is indeed an Agreement to arbitrate at all.

Now as I say that really is a very different issue from the one that was dealt with in Prima Paint, that was dealt with in that Dial-A-Mattress case that I had and it went up to the Seventh Circuit.

So that's where we are. I deny the motion. It seems to me that what then you ought to be thinking about is how to pose the issue in a way that the Court can address it, whether through hearing, I would expect, or some appropriate way. That's why I use the term "appropriate way". It seems to me that you have to go back and consider that, and then when it's ripe I will deal it. so that's my ruling.

* * * *

APPENDIX C — FAA REGULATIONS

9 USC Sec. 1

TITLE 9 - ARBITRATION

CHAPTER 1 - GENERAL PROVISIONS

Sec. 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

Appendix C

9 USC Sec. 2

Sec. 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 USC Sec. 3

Sec. 3. Stay of proceedings where issue therein referable to arbitration

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement, providing the applicant for the stay is not in default in proceeding with such arbitration.

Appendix C

9 USC Sec. 4

Sec. 4. Failure to arbitrate under agreement; petition to United States court having jurisdiction for order to compel arbitration; notice and service thereof; hearing and determination

A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, or if the matter in dispute is within

admiralty jurisdiction, the court shall hear and determine such issue. Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose. If the jury find that no agreement in writing for arbitration was made or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the jury find that an agreement for arbitration was made in writing and that there is a default in proceeding thereunder, the court shall make an order summarily directing the parties to proceed with the arbitration in accordance with the terms thereof.